STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 3, 2011
v	No. 295388 Ingham Circuit Court
JEFFREY SCOTT MISNER, Defendant-Appellant.	LC No. 09-000102-FC

Before: FITZGERALD, P.J., and O'CONNELL and METER, JJ.

PER CURIAM.

Defendant Jeffrey Scott Misner was convicted by a jury of assault with intent to do great bodily harm less than murder, MCL 750.84. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to 72 months to 20 years' imprisonment, with 247 days of jail credit. Defendant now appeals as of right. We affirm.

Defendant's conviction arose from an altercation that occurred at a friend's home, where defendant and the victim had been socializing. Defendant left the home, but returned later the same night with nunchucks. Defendant began hitting the victim with the nunchucks and his fists, and was still fighting with the victim when police arrived. The police arrested defendant.

On appeal defendant challenges the proportionality of his minimum and maximum sentences. This Court must affirm a minimum sentence that is within the statutory guidelines unless the trial court erred in scoring the guidelines or relied on inaccurate information in determining the sentence. *People v Babcock*, 469 Mich 247, 255-256, 261; 666 NW2d 231 (2003). The trial court set defendant's minimum sentence at 72 months' imprisonment. As a repeat offender, the recommended minimum sentence range under the legislative guidelines was 19 to 76 months. Defendant's minimum sentence is within the guidelines range, and defendant does not argue that there was an error in the scoring of the guidelines or that the trial court relied on inaccurate information. Thus, defendant's minimum sentence must be affirmed. *Babcock*, 469 Mich at 255-256; MCL 769.34(10).

Regarding defendant's maximum sentence, "[t]his Court reviews a trial court's sentence imposed on an habitual offender for an abuse of discretion." *People v Reynolds*, 240 Mich App 250, 252; 611 NW2d 316 (2000). Defendant's maximum sentence is set by statute. The statutory maximum sentence for a first time offender convicted of assault with intent to do great bodily harm less than murder is ten years. MCL 750.84. Because defendant is an habitual

offender, fourth offense, his maximum sentence for conviction of assault with intent to do great bodily harm less than murder is imprisonment for life. MCL 769.12(1)(a). Thus, the trial court had discretion to determine defendant's maximum sentence, and in this case, the trial court set the maximum sentence at 20 years' imprisonment.

The trial court in this case did not abuse its discretion when it sentenced defendant to a maximum term of 20 years' imprisonment. "A given sentence constitutes an abuse of discretion if that sentence violates the principle of proportionality, which requires the sentence be proportional to the seriousness of the circumstances surrounding the offense and offender." *People v Lowery*, 258 Mich App 167, 172; 673 NW2d 107 (2003). In other words, "[a] trial court does not abuse its discretion in sentencing an habitual offender within the statutory limits established by the Legislature when the offender's underlying felony, in the context of previous felonies, evinces the defendant's inability to conform his conduct to the laws of society." *Reynolds*, 240 Mich App at 252. In this case, the trial court was aware of the circumstances surrounding the offense, and it also explicitly stated that it considered defendant's criminal record in fashioning the maximum sentence. In context of defendant's previous felonies, the trial court indicated that defendant had been unable to conform his conduct to the laws of society. With respect to the immediate offense, defendant was convicted of a serious crime, assault with intent to do great bodily harm. Thus, the 20 year maximum, which is within the statutory maximum, is proper, and the trial court did not abuse its discretion.[1]

Lastly, defendant argues that this Court should order the Department of Corrections to make changes to his presentence investigation report. During the sentencing hearing, defendant objected to three entries in his presentence report. These entries reflected charges for which defendant was acquitted or charges that were dismissed. The entries accurately depicted that defendant was acquitted or that the charge was dismissed, but defendant argued that the record of the charge should not be in his presentence report. The prosecution did not challenge defendant's assertion, and the trial court stated that it placed "a line through it and indicated that they are to strike" the objected to entries. There was no further discussion regarding the presentence report on the record. On appeal, defendant alleges the report has still not been corrected. Defendant is entitled to have information that is irrelevant or inaccurate stricken from his presentence report. *People v Taylor*, 146 Mich App 203, 205-206; 380 NW2d 47 (1985).

MCL 771.14(6) covers the procedure for challenge to the presentence investigation report and provides:

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[1] In reaching our conclusion, we reject defendant's argument that the ruling in *People v Tanner*, 387 Mich 683, 690; 199 NW2d 202 (1972), requires this Court to find defendant's maximum sentence disproportionate. The rule in *Tanner* applies to minimum sentences. We also reject defendant's assertion that the trial court may have increased his sentence to give him more time to receive mental health treatment in prison. The record does not support this assertion, and more importantly, defendant abandons the issue for failure to cite relevant authority. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

> At the time of sentencing, either party may challenge, on the record, the accuracy or relevancy of any information contained in the presentence investigation report. The court may order an adjournment to permit the parties to prepare a challenge or a response to a challenge. If the court finds on the record that the challenged information is inaccurate or irrelevant, that finding shall be made a part of the record, the presentence investigation report shall be amended, and the inaccurate or irrelevant information shall be stricken accordingly before the report is transmitted to the department of corrections.

Thus, the plain language of the statute requires that the trial court ensure the report is corrected before the report is transmitted to the department of corrections. In this case, while the trial court stated the report was corrected on the record, nothing in the record demonstrates that the report was properly corrected before it was submitted to the department of corrections. Thus, we remand the case to the trial court for proper correction of defendant's presentence report and for transmission of the corrected report to the department of corrections. See *People v Melton*, 487 Mich 851; 784 NW2d 216 (2010) (remanding case for correction of presentence report); *People v Swartz*, 171 Mich App 364, 366-367, 380-381; 429 NW2d 905 (1988) (remanding case for correction of presentence report). Defendant's sentence is affirmed because the trial court made it clear on the record that the contested information was not considered in fashioning defendant's sentence. See *Swartz*, 171 Mich App at 380-381; *People v Thompson*, 189 Mich App 85, 88; 472 NW2d 11 (1991).

Affirmed, but remanded for the ministerial task of correcting the presentence report in keeping with the trial court's statement at sentencing. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell
/s/ Patrick M. Meter